

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,)	
)	
Plaintiff/Respondent,)	CR 05-1105 PCT JAT
)	CIV 08-8051 PCT JAT (MEA)
v.)	
)	REPORT AND RECOMMENDATION
Miguel Angel Mejia Vasquez,)	
)	
Defendant/Movant.)	
)	
)	

TO THE HONORABLE JAMES A. TEILBORG:

Mr. Miguel Angel Mejia Vasquez ("Movant") is currently confined at the United States prison at Ray Brook, New York, pursuant to his conviction by the United States District Court for the District of Arizona. On April 24, 2008, Movant filed a *pro se* motion pursuant to 28 U.S.C. § 2255, challenging his conviction on one count of illegal reentry into the United States. Respondent filed a Response in Opposition to Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 ("Response") on July 11, 2008. Movant filed a reply to the response on July 28, 2008.

I Procedural History

Movant is a citizen of Mexico, who entered the United States illegally as a minor child with his parents.¹ In August of 1997, Movant was convicted by an Arizona state court on one count of possession of dangerous drugs. See Docket No. 120 (Movant's memorandum of law in support of his section 2255 motion).² Movant received a sentence of three years probation pursuant to this conviction. Id. In March of 1998 Movant was ordered removed from the United States. Id. In July of 1998 Movant's probation regarding his state 1997 drug conviction was revoked and Movant was sentenced to a term of two years imprisonment pursuant to that conviction. Id. It appears Movant was not removed from the United States pursuant to the March order prior to the time that his supervised release was revoked in his state criminal proceedings and he was again taken into state custody in July. In February of 1999 the Arizona Court of Appeals ordered that Movant be re-sentenced because Movant could not be sentenced to a term of incarceration for this offense. Id.

In 1999, pursuant to a guilty plea, Movant was convicted by the United States District Court for the District of Arizona on one count of conspiracy to possess with intent to distribute methamphetamine. See United States v. Vasquez, et al., 2:98 CR 000698 PHX JAT (Movant is defendant number 11), at

¹ Movant was apparently born in 1977 and entered the United States with his parents at the age of six.

² The information provided by Movant indicates he had other state court convictions for criminal damage in 1997 and trespass in 1995.

1 Docket No. 153.³ Pursuant to this conviction, on February 9,
2 2000, Movant was sentenced to a term of 33 months imprisonment
3 followed by 60 months of supervised release, with credit for 448
4 days of pre-sentence incarceration. Id. at Docket No. 267. A
5 condition of the supervised release was that Movant not reenter
6 the United States without legal authorization. See Response,
7 Attach. at 137.⁴ On or about October 18, 2000, Movant was
8 released from the custody of the Bureau of Prisons and began his
9 term of 60 months of supervised release. Id., Attach. at 137.

10 On May 10, 2000, Movant was ordered removed from the
11 United States to Mexico by an Immigration Judge pursuant to INA
12 section 241(a)(5), codified at 8 U.S.C. § 1231(a)(5).⁵ See
13 Response, Attach. at 111. Movant was deported from the United
14 States on or about October 21, 2000. Id., Attach. at 112.

15 Using an address in Lake Havasu City, Arizona, Movant
16 applied for a United States work visa on or about February 17,
17 2005. Reply, Exh. at 3 ("Appendix #11").⁶ Movant was in the

18
19 ³ Prior to being assigned to the Honorable James A. Teilborg the
20 1998 criminal case was assigned to the Honorable Roger Strand.

21 ⁴ Movant's conviction for violation of 21 U.S.C. §§ 841(a)(1) &
22 846 made him removable and ineligible for relief from removal because
23 he was an alien who had committed an aggravated felony, i.e., a
24 federal drug trafficking crime. See 8 U.S.C. §§ 1182(a)(2)(A)(i)(II)
25 & (2)(C)(i) (2005 & Supp. 2008).

26 ⁵ Section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5) provides for
27 the reinstatement of removal orders against aliens who illegally
28 reenter the United States after having been removed or voluntarily
departed under an order of removal.

26 ⁶ Additionally, in 2004 Movant's father applied for an immigrant
27 visa for Movant, based on his own status as a United States citizen.
28 The application was granted in early 2008. Reply, Exh. at 4
("Appendix 12"). However, the Notice of Action explicitly states that
Movant was not eligible to adjust his status and explicitly states
that the approval of the application did not function as a visa. Id.

1 custody of local authorities in Lake Havasu City, Arizona, on or
2 about August 20, 2005. Response, Attach. at 6. Movant was
3 retrieved from the Mohave County jail and taken into custody by
4 an Immigration and Customs Enforcement ("ICE") agent and
5 transported to Blythe, California. Id., Attach. at 5-6. Movant
6 was Mirandized in Spanish and then interviewed by an ICE agent.
7 Id., Attach. at 18-24. Movant told the agent he had most
8 recently entered the United States on or about August 15, 2005,
9 on foot, through the desert, accompanied by other immigrants.
10 Id., Attach. at 25. Movant further admitted he had not been
11 inspected by government officials when he reentered the United
12 States. Id., Attach. at 25. Movant also "readily" told the
13 ICE agent he had been previously removed from the United States.
14 Id., Attach. at 26.

15 On October 25, 2005, a grand jury indictment charged
16 Movant with one count of illegal reentry after deportation, in
17 violation of 8 U.S.C. § 1326(a) as enhanced by subsection
18 (b)(2). See Reply, Exh. at 2.⁷ The indictment alleged that
19 Movant "entered and was found in" the United States after having
20 been previously removed from the United States and without

21
22 ⁷ Section 1326 provides that any alien who--
23 (1) has been ... deported, or removed or has departed the
24 United States while an order of exclusion, deportation, or
25 removal is outstanding, and thereafter
26 (2) enters, attempts to enter, or is at any time found in,
27 the United States, ...
28 shall be fined under Title 18, or imprisoned not more than
2 years, or both.
8 U.S.C. § 1326(a) (2005 & Supp. 2008). Subsection (b)(2) provides:
Notwithstanding subsection (a) of this section, in the case
of any alien described in such subsection--
(2) whose removal was subsequent to a conviction for commission
of an aggravated felony, such alien shall be fined under such
Title, imprisoned not more than 20 years, or both...

1 having obtained the express consent of the Department of
2 Homeland Security to reenter. Id., Exh. at 2. On September 28,
3 2005, the government filed a charge that Movant had violated the
4 conditions of his release in his 1998 criminal matter. See
5 United States v. Vasquez, et al., 2:98 CR 000698 PHX JAT at
6 Docket No. 325.

7 Movant was appointed counsel and a jury trial was
8 conducted in May of 2006, which resulted in a conviction on the
9 charge stated in the 2005 indictment, i.e., illegal reentry
10 after deportation without authorization. Response, Attach. at
11 1-110. Movant's counsel first argued to the Court that Movant
12 was entitled to an acquittal based on the "continual
13 surveillance" or "official restraint" doctrines. Id., Attach.
14 at 99-110. Movant testified at his trial and Movant testified
15 he thought he had permission to return to the United States.
16 Id., Attach. at 104. Movant testified he had not entered
17 through the desert but through a Border Patrol station at
18 Calexico on a date he did not recall. Id., Attach. at 107-08.
19 During Movant's trial, defense counsel challenged the ICE
20 agents' identification of Movant as being the person interviewed
21 on or about August 20, 2005, and asserted their Mirandizing and
22 questioning of Movant in Spanish was improper. Id., Attach. at
23 1-109.

24 At a sentencing hearing conducted October 10, 2006, the
25 Court noted that, based on Movant's conviction for violation of
26 section 1326 as aggravated by subsection (b), and his prior
27 criminal conviction for a methamphetamine-trafficking crime, the
28 sentencing range for his conviction for violation of section

1 1326 was 92 to 115 months. At the hearing Movant and his
2 counsel argued for a downward departure from the applicable
3 sentencing range. Movant told the Court he had reviewed the
4 presentence report and, after he was sentenced, Movant told the
5 Court he had only had two days to review the report. Id.,
6 Attach. at 130-31.

7 Movant did not dispute the factual allegations in the
8 presentence report but objected to the characterization of
9 himself and his acts in the report. Id., Attach. at 114-33.
10 Movant told the Court he disliked his attorney and stated he had
11 "continually proclaimed [his] innocence." Id., Attach. at 117.
12 Movant asserted his counsel had urged him to plead guilty and
13 that counsel was unwilling to listen to his explanations
14 regarding his "previous criminal acts." Id., Attach. at 117.
15 Movant did not deny his prior convictions or removal as stated
16 in the presentence report but asserted that his previous
17 convictions were the result of "youth and to chemical usage" and
18 that he was not then violent or addicted to drugs. Id., Attach.
19 at 117-18.⁸ Movant alleged he had been "railroaded" with regard
20 to his previous removal. Id., Attach. at 119. Movant asserted
21 that statements in the presentence report were "accusations that
22 never went anywhere." Id., Attach. at 118. Movant argued that
23 he did not deserve to be sentenced to a term of eight years
24 imprisonment based on "domestic disputes and driving
25 offenses..." Id., Attach at 119.

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27
28 ⁸ In 2005 Movant was convicted of disorderly conduct, charges
arising from an altercation with his brother. See Docket No. 121,
"Appendix 10."

1 At the sentencing hearing, the government told the
2 Court Movant had been offered a "fast track" plea agreement
3 providing for a sentence of 46 to 57 months imprisonment and
4 that Movant had been offered another plea agreement providing
5 for a sentencing range of 51 to 63 months imprisonment. Id.,
6 Attach. at 123.

7 Movant was sentenced to a term of 92 months
8 imprisonment pursuant to his conviction for violation of section
9 1326(a) as enhanced by subsection (b). Id., Attach. at 126 &
10 134-36. The Court noted Movant's propensity to re-offend,
11 including the fact that his very-mitigated sentence in the 1998
12 matter pursuant to his plea agreement had not deterred him from
13 again violating the laws of the United States. Id., Attach. at
14 127-28. The Court also revoked Movant's supervised release in
15 his 1998 case and sentenced him to a term of seven months
16 imprisonment pursuant to the violation of supervised release, to
17 be served consecutively to his 92 month sentence. Id., Attach.
18 at 127-29 & 140.

19 Movant took a direct appeal of his conviction and
20 sentences to the Ninth Circuit Court of Appeals and was
21 appointed counsel to represent him in his direct appeal.
22 Movant's conviction and sentence were affirmed by the Ninth
23 Circuit in a decision issued March 3, 2008. See United States
24 v. Mejia Vasquez, 3:05 CR 1105 PCT JAT, Docket No. 118. Movant
25 asserts that, in his direct appeal, he alleged he was denied the
26 effective assistance of counsel, and that the indictment was
27 defective and that the government violated the Brady doctrine by
28 failing to disclose exculpatory evidence to the defense. See

1 Section 2255 Motion at 2.

2 In its decision denying Movant's direct appeal, the
3 Ninth Circuit Court of Appeals rejected Movant's contention that
4 the District Court erroneously denied his motion for an
5 acquittal and also erred by revoking his supervised release.
6 See United States v. Mejia Vasquez, 3:05 CR 1105 PCT JAT, Docket
7 No. 118. The Ninth Circuit also rejected Movant's contention
8 that the Court "made various errors in calculating his
9 sentence," including adding criminal history points for a 1997
10 state criminal conviction for a first-time drug offense. Id.
11 The Ninth Circuit also stated Movant had argued his prior state
12 conviction for criminal damage should not have been used to
13 increase his criminal history. Id. Additionally, Movant argued
14 to the Ninth Circuit that the District Court erred by not
15 according Movant two levels of sentencing credit for his
16 "acceptance of responsibility." Id.

17 In this section 2255 action Movant asserts he is
18 entitled to relief from his conviction and sentence because he
19 was denied his right to the effective assistance of counsel.
20 Movant also contends the government presented false and
21 misleading evidence to the grand jury, in violation of his right
22 to due process and a fair trial. Movant contends that the grand
23 jury should have been informed that a prior state conviction had
24 been vacated. Movant alleges the indictment was defective
25 because it did not list aggravating sentencing factors on the
26 indictment. Additionally, Movant asserts he is entitled to
27 habeas relief because the government failed to provide
28 exculpatory material to defense counsel, i.e., that Movant's

1 state court conviction had been vacated.

2 **II Discussion**

3 "Habeas review is an extraordinary remedy and will not
4 be allowed to do service for an appeal." Bousley v. United
5 States, 523 U.S. 614, 621, 118 S. Ct. 1604, 1610 (1998).
6 Accordingly, section 2255 relief is precluded on any claim that
7 was raised and decided in the movant's direct appeal. See,
8 e.g., United States v. Hayes, 231 F.3d 1132, 1139 (9th Cir.
9 2000); United States v. Scrivner, 189 F.3d 825, 828 (9th Cir.
10 1999). Additionally, absent a showing of cause and prejudice,
11 a federal habeas petitioner procedurally defaults all claims
12 which are not raised in his direct appeal, other than claims
13 asserting the petitioner was deprived of the effective
14 assistance of counsel. See United States v. Frady, 456 U.S.
15 152, 167-68, 102 S. Ct. 1584, 1594 (1982); United States v.
16 Ware, 416 F.3d 1118, 1121 (9th Cir. 2005); United States v.
17 Johnson, 988 F.2d 941, 945 (9th Cir. 1993). "[T]o obtain
18 collateral relief based on trial errors to which no
19 contemporaneous objection was made, a convicted defendant must
20 show both (1) 'cause' excusing his double procedural default,
21 and (2) 'actual prejudice' resulting from the errors of which he
22 complains." Frady, 456 U.S. at 167-68, 102 S. Ct. at 1594.

23 Movant asserts he raised his claims regarding an
24 alleged violation of Brady v. Maryland and the evidence
25 presented to the grand jury, in his direct appeal. If this were
26 so, relief on these claims would be precluded because they were
27 raised and decided in Movant's direct appeal. See Hayes, 231
28 F.3d at 1139; Scrivner, 189 F.3d at 828.

1 However, the opinion of the Ninth Circuit Court of
2 Appeals denying Movant's direct appeal does not indicate that
3 Movant raised a Brady claim or a claim regarding the grand jury
4 proceedings in that court. To the extent any claim regarding
5 Brady or the grand jury process was not raised in Movant's
6 direct appeal, such a claim has been procedurally defaulted.
7 Movant has not shown cause for, nor prejudice arising from, his
8 procedural default of these claims. Movant does not assert that
9 he is factually innocent of the crime of conviction, i.e., that
10 he did not reenter the United States without permission after
11 being previously deported, but instead argues that he is legally
12 innocent of the crimes as charged because, inter alia, his
13 sentence was predicated on a conviction he alleges was reversed
14 and because he had applied for permission to be in the United
15 States at the time he was "found in" the United States.
16 Therefore, to the extent any Brady or grand jury claim was not
17 presented in Movant's direct appeal, section 2255 relief on the
18 claims is barred because Movant has not shown cause for his
19 procedural default of these claims or actual prejudice arising
20 from his default of these claims.

21 **Movant's ineffective assistance of counsel claim.**

22 Claims of ineffective assistance of federal criminal
23 counsel are properly raised for the first time in a section 2255
24 action. See, e.g., United States v. McKenna, 327 F.3d 830, 845
25 (9th Cir. 2003). To prevail on his claims, Movant must
26 establish both that his counsel's performance was unreasonable
27 under the prevailing professional standards and the reasonable
28 probability that, but for counsel's unprofessional errors, the

1 results of his criminal proceedings would have been different.
2 See Strickland v. Washington, 466 U.S. 668, 694-95, 104 S. Ct.
3 2052, 2068-69 (1984); Hasan v. Galaza, 254 F.3d 1150, 1154 (9th
4 Cir. 2001); United States v. Span, 75 F.3d 1383, 1386-87 (9th
5 Cir. 1996). Movant bears the burden of providing sufficient
6 evidence from which the Court can conclude his counsel was
7 ineffective. See Turner v. Calderon, 281 F.3d 851, 878 (9th
8 Cir. 2002).

9 Movant must overcome a strong presumption that his
10 counsel's representation was within a wide range of reasonable
11 professional assistance. See United States v. Molina, 934 F.2d
12 1440, 1447 (9th Cir. 1991). To establish that counsel's conduct
13 was unconstitutionally substandard, a section 2255 petitioner
14 must establish that no competent counsel would have acted as his
15 counsel acted, i.e., that his counsel's acts were unreasonable.
16 United States v. Fredman, 390 F.3d 1153, 1156 (9th Cir. 2004);
17 Johnson v. Alabama, 256 F.3d 1156, 1176-77 (11th Cir. 2001).

18 Movant must also establish that, but for counsel's
19 error, the result of his trial would have been different. See
20 Hasan, 254 F.3d at 1154. Because Movant must establish
21 prejudice arising from any error, counsel is *per se* not
22 ineffective if counsel "failed" to raise a meritless argument or
23 to pursue a meritless defense. See, e.g., Wilson v. Henry, 185
24 F.3d 986, 991 (9th Cir. 1999); James v. Borg, 24 F.3d 20, 27
25 (9th Cir. 1994); Morrison v. Estelle, 981 F.2d 425, 427-28 (9th
26 Cir. 1992); Baumann v. United States, 692 F.2d 565, 572 (9th
27 Cir. 1982) ("The failure to raise a meritless legal argument
28 does not constitute ineffective assistance of counsel.").

1 Movant contends his trial counsel was ineffective
2 because he failed to challenge the "defective" indictment.⁹
3 Movant also contends counsel was ineffective because he failed
4 to challenge the indictment on the basis that it did not include
5 "all enhancements" the government "planned to use...", in
6 violation of Movant's Fifth Amendment rights. Movant further
7 asserts counsel should have argued that Movant had not been
8 denied admission into the United States, but instead that Movant
9 had submitted an "application to reside in the United States" at
10 the time the indictment was issued.

11 None of the acts ascribed to counsel can be deemed
12 unreasonable and, accordingly, counsel's performance was not
13 deficient. The indictment, which alleged the elements of a
14 violation of section 1326 as aggravated by subsection (b),
15 satisfied the constitutional requirements for an indictment
16 alleging violation of this section. Almendarez-Torres v. United
17 States, 523 U.S. 224, 240, 118 S. Ct. 1219, 1229 (1998) (holding
18 a subsection (b) aggravating factor need not be pled in the
19 indictment alleging violation of section 1326). Accordingly,
20 the indictment was not defective and counsel did not err by
21 failing to challenge the indictment. Nor has Movant established
22 that, had counsel challenged the indictment, the outcome of his
23 criminal proceedings would have been different.

24
25 ⁹ Movant contends the indictment was defective because it alleged
26 a "prior drug conviction ... when the above Arizona conviction was
27 vacated by the Arizona State Court." Section 2255 motion at 5. The
28 conviction was not reversed, the sentence imposed was reversed. See
Mejia v. Irwin, 195 Ariz. 270, 272, 987 P.2d 756, 758 (Ct. App. 1999)
(noting Movant's plea agreement in that matter had resulted in the
dismissal of other charges, but that Movant stood convicted of
possession of dangerous drugs).

1 Additionally, counsel was not ineffective for arguing
2 that, at the time the indictment was issued in 2005, Movant's
3 father, a United States citizen, had applied for a visa for
4 Movant as his adult child, nor was counsel ineffective for
5 "failing" to argue that Movant had applied for work visa prior
6 to the time that he entered the United States in 2005. Neither
7 application was "permission" from the Department of Homeland
8 Security to enter the United States or consent to Movant to
9 apply for lawful admission and, accordingly, counsel was not
10 ineffective for failing to raise a meritless argument nor can
11 Movant establish any prejudice thereby. See United States v.
12 Flores-Villar, ___ F.3d ___, 2008 WL 3008975, at *6 (9th Cir.)
13 (holding violation of section 1326 is a general intent crime and
14 the defendant's subjective belief that they had permission to
15 reenter was not a defense to the charge); Delgado v. Mukasey,
16 516 F.3d 65, 74 (2d Cir. 2008). Movant's subjective intent that
17 he believed he had received permission to reenter, which was
18 expressed to the jury, was not something the government was
19 required to prove nor was the jury required to find Movant not
20 guilty if it concluded he had applied for legal reentry prior to
21 the time he entered in August of 2005.

22 **III Conclusion**

23 Movant procedurally defaulted the claims stated in his
24 section 2255 petition except for his ineffective assistance of
25 counsel claims. Movant has not shown cause for, nor prejudice
26 arising from, his procedural default of his claims.
27 Additionally, Movant's ineffective assistance of counsel claims
28 must be denied because Movant has not established that his

1 counsel's performance was deficient or that he was prejudiced by
2 any alleged error of counsel.

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4 **IT IS THEREFORE RECOMMENDED** that Mr. Mejia Vasquez'
5 Motion to Vacate, Set Aside, or Correct Sentence, be **denied and**
6 **dismissed with prejudice.**

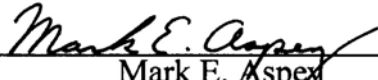
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8 This recommendation is not an order that is immediately
9 appealable to the Ninth Circuit Court of Appeals. Any notice of
10 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
11 Procedure, should not be filed until entry of the district
12 court's judgment.

13 Pursuant to Rule 72(b), Federal Rules of Civil
14 Procedure, the parties shall have ten (10) days from the date of
15 service of a copy of this recommendation within which to file
16 specific written objections with the Court. Thereafter, the
17 parties have ten (10) days within which to file a response to
18 the objections. Pursuant to Rule 7.2, Local Rules of Civil
19 Procedure for the United States District Court for the District
20 of Arizona, objections to the Report and Recommendation may not
21 exceed seventeen (17) pages in length.

22 Failure to timely file objections to any factual or
23 legal determinations of the Magistrate Judge will be considered
24 a waiver of a party's right to de novo appellate consideration
25 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
26 1121 (9th Cir.) (en banc), cert. denied, 540 U.S. 900 (2003).
27 Failure to timely file objections to any factual or legal
28 determinations of the Magistrate Judge will constitute a waiver

1 of a party's right to appellate review of the findings of fact
2 and conclusions of law in an order or judgment entered pursuant
3 to the recommendation of the Magistrate Judge.

4 DATED this 8th day of August, 2008.

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8 Mark E. Aspery
9 United States Magistrate Judge
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